MOTION FILED

OCT 5 2000

(3)

No. 00-353

In the Supreme Court of the United States

OMNIPOINT COMMUNICATIONS ENTERPRISES, L.P.,

Petitioner,

v.

NEWTOWN TOWNSHIP
AND
THE ZONING HEARING BOARD
OF NEWTOWN TOWNSHIP,

Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

MOTION FOR LEAVE TO FILE AND BRIEF OF *AMICUS CURIAE* DOBSON COMMUNICATIONS CORPORATION IN SUPPORT OF PETITIONER

MICHAEL DEUEL SULLIVAN*
CHRISTIANA L. LIN

WILKINSON BARKER KNAUER, LLP
2300 N Street, N.W., Suite 700
Washington, D.C. 20037-1128
202.783.4141

October 5, 2000

* *Counsel of Record*

24pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

MOTION FOR LEAVE TO FILE 1

BRIEF OF *AMICUS CURIAE* DOBSON COMMUNICATIONS CORPORATION IN SUPPORT OF PETITIONER 4

INTEREST OF *AMICUS CURIAE* 4

SUMMARY OF ARGUMENT 6

REASONS FOR GRANTING THE PETITION 8

I. THE COURT OF APPEALS' DECISION CONFLICTS WITH OTHER CIRCUITS, REQUIRING CLARIFICATION BY THIS COURT TO AVOID INCONSISTENT RESULTS AND DAMAGING EFFECTS 9

A. The Fourth Circuit Would Allow Local Governments to Prohibit the Provision of Wireless Services through Case-Based Denials 10

B. The First Circuit's "Hostility" Requirement Contradicts the Statutory Scheme 13

C. The Standard Adopted by the Second Circuit Fails to Take into Account Consumers' Interests 14

D. Review by This Court Is Needed 14

II. THE COURT OF APPEALS DECISION VIOLATES THE TELECOMMUNICATIONS ACT OF 1996 16

A. The Court of Appeals Decision Contradicts the Prohibition in Section 332(c)(7)(B)(i)(II) 16

B. The Court of Appeals' Decision Undermines the Objectives of Promoting Competition and Innovation 18

CONCLUSION 20

TABLE OF AUTHORITIES

Cases

360 Degrees Communications Co. of Charlottesville v. Board of Supervisor of Albemarle County, 211 F.3d 79 (4th Cir. 2000) 12, 13, 14

APT Pittsburgh Limited Partnership v. Penn Township, 196 F.3d 469 (3d Cir. 1999) 9

AT&T Wireless PCS, Inc. v. City Council of Virginia Beach, 155 F.3d 423 (4th Cir. 1998) 10, 11, 12

Omnipoint Communications Enterprises, L.P. v. Newtown Township, 219 F.3d 240 (3d Cir. 2000) 9, 16

Sprint Spectrum L.P. v. Willoth, 176 F.3d 630 (2d Cir. 1999) 12, 14

Town of Amherst, N.H. v. Omnipoint Communications Enterprises, Inc., 173 F.3d 9 (1st Cir. 1999). 11, 13

Statutes

47 U.S.C. § 332(c)(7)(B)(i)(II) passim

47 U.S.C. § 332(c)(7)(B)(v) 12, 13

Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996). 18

Other Authorities

Federal Communications Commission, *Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Services*, FCC 00-289, 2000 FCC LEXIS 4372 (2000) 14

No. 00-353

In the Supreme Court of the United States

OMNIPOINT COMMUNICATIONS ENTERPRISES, L.P.,

Petitioner,

v.

NEWTOWN TOWNSHIP
AND
THE ZONING HEARING BOARD OF NEWTOWN TOWNSHIP,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

MOTION FOR LEAVE TO FILE AND BRIEF OF *AMICUS CURIAE* DOBSON COMMUNICATIONS CORPORATION IN SUPPORT OF PETITIONER

Amicus curiae Dobson Communications Corporation hereby submits its motion for leave to file its brief in support of the petition for a writ of *certiorari* to the United States Court of Appeals for the Third Circuit filed by Omnipoint Communications Enterprises, L.P., and includes herewith its brief.

MOTION FOR LEAVE TO FILE

Pursuant to Supreme Court Rule 37.1, Dobson Communications Corporation ("Dobson") respectfully moves this Court for leave to file the annexed brief *amicus curiae* in support of the petition for writ of certiorari filed by Omni-

point Communications Enterprises, L.P. ("Petitioner" or "Omnipoint").[1]

The issues presented by this case are critical to the proper interpretation of 47 U.S.C. § 332(c)(7)(B)(i)(II), which proscribes local governments from regulating the placement, construction, or modification of wireless facilities so as to "have the effect of prohibiting the provision of personal wireless services." Dobson is a provider of such personal wireless services; its subscribers rely on the networks of wireless facilities of Dobson and other providers cooperating with Dobson nationwide to use their wireless phones. Dobson and other wireless providers seek to provide coverage throughout their designated service areas that is as nearly "seamless" as possible, minimizing or eliminating "dead spots" in areas where subscribers are likely to seek to use their phones. On its face, Section 332(c)(7)(B)(i)(II) is intended to facilitate the location of transmitting facilities (antennas and towers) so as to avoid such dead spots, or gaps in coverage. The Court of Appeals, however, adopted an interpretation of this Section that allows local authorities to impede the placement of transmitting facilities where needed, on the theory that if there is any existing wireless service covering a given area, other competing providers need not be allowed to extend their coverage to such area.

The effect of this ruling will be to diminish the availability of service to Dobson's subscribers, because the service that may exist in a given area may not be usable by Dobson's subscribers. In addition to serving its own subscribers, Dobson serves as a roaming partner for other wireless service

---

[1] Counsel has been informed that Petitioner is today filing its "Consent to Briefs by *Amicus Curiae*" with the Court. Counsel for Respondent, however, has informed undersigned counsel that the Respondent declines to consent. Accordingly, Dobson is obliged to move for leave to file its brief as *amicus curiae*.

providers. Thus, when one of its partners' subscribers is in an area served by Dobson, the subscriber can make and receive calls to and from the national telephone network through Dobson's facilities. If a gap in Dobson's coverage exists, the subscriber cannot access the network via Dobson's facilities, and the subscriber's phone may not be usable to place or receive calls over another system or may be usable only if the subscriber agrees to pay higher charges. Also, the subscriber may not be able to receive calls as a roamer over the other system if the system operator does not have a roaming agreement with the subscriber's home system.

As a rural and suburban wireless provider, Dobson believes its perspective will assist the Court in understanding the importance of the proper interpretation of Section 332(c)(7)(B)(i)(II). Because Dobson is not a provider with a nationwide presence, it must rely on other providers to make "roaming" service available to its subscribers in markets where it does not operate. Thus, a rule that makes it more difficult for either Dobson or its roaming partners to serve its subscribers' phones in a particular area, merely because some other carrier (whose service may not be technically compatible with the subscriber's phone) has service available in that area, will adversely affect the availability of service to subscribers of Dobson and other similarly situated service providers.

Moreover, the lack of uniformity resulting from the divergent rules propounded by the several Court of Appeals that have interpreted Section 332(c)(7)(B)(i)(II) further impedes the provision of ubiquitous wireless service relied on by the nation's 86 million wireless subscribers. Dobson and most other providers must plan, build, manage, and operate personal wireless service networks in multiple states. Dobson operates in 18 states, for example. The existence of fundamentally different rules concerning the establishment of com-

peting wireless service facilities from circuit to circuit adds needless complexity, uncertainty, and cost to the provision of this technologically challenging and publicly beneficial service.

For the foregoing reasons, Dobson respectfully moves the Court for leave to file the brief that follows.

BRIEF OF *AMICUS CURIAE* DOBSON COMMUNICATIONS CORPORATION IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

Dobson Communications Corporation is a provider of personal wireless services in rural and suburban locations. Dobson participates in the provision of these services through its own wireless systems and through systems owned by American Cellular Corporation, a joint venture equally owned by Dobson and AT&T Wireless, altogether serving a total of 1,045,200 subscribers in 71 markets in 18 states, with a population of 11.5 million potential subscribers. Dobson has an interest in this case because of the potential negative impact of the Court of Appeals' decision on the range and quality of wireless services that wireless carriers will be able to provide to consumers.

Dobson began its wireless operations in 1990 with cellular systems in Oklahoma and the Texas Panhandle, and it has rapidly expanded its cellular operations with a primary focus on areas with a substantial need for wireless communications. As of June 30, 2000, Dobson itself owned over 39 cellular markets in 13 states with 556,700 subscribers and managed cellular systems that cover a total population of approximately 6.6 million. The company's managed network is made

up of 25 switching centers and over 1,000 cell sites throughout the United States. Taking into account its joint venture with AT&T and American Cellular Corporation, Dobson is the eighth largest wireless provider in the United States.

Dobson has an aggressive business plan for building out its network in rural and suburban areas where there is a substantial need for wireless communications. In order to provide adequate wireless services to its consumers, Dobson must be able to install facilities in municipalities where it is licensed to serve. During 2000 and 2001, Dobson's plans call for about 279 transmitter locations to be constructed. Of these, 42 new proposed towers are to be constructed by Dobson itself and 84 new proposed towers are to be constructed by American Cellular. In 2001, current plans call for 79 new proposed towers to be constructed by Dobson itself and 74 new proposed towers to be constructed by the American Cellular joint venture. These figures make clear that Dobson will be vitally affected by its ability to construct new transmitting facilities. If Dobson is unable to build these new facilities due to local zoning and regulatory determinations premised on the fact that an alternative service provider already serves the area, Dobson will be unable to provide service in areas where its subscribers expect it.

This case will have a major effect on wireless carriers such as Dobson. At issue is whether local governments may decide not to authorize the construction of wireless facilities merely because there is another wireless service in the same area, given the prohibition by 47 U.S.C. § 332(c)(7)(B)(i)(II) on such officials taking actions that prohibit, or have the effect of prohibiting, the provision of personal wireless services.

In the case below, the Court of Appeals found that denial of an individual application to install a facility at a particular location in order to fill a provider's gap in coverage is not a "prohibition" of personal wireless service so long as the area

to be covered by that facility is being served by another carrier. The First, Second, and Fourth Circuits have followed different approaches to the interpretation of Section 332(c)(7)(B)(i)(II) from that of the Third Circuit. As a result, there are different and conflicting rules in the four circuits that have addressed the matter. Dobson is clearly adversely affected by the lack of a nationally uniform interpretation of this Section, and urges this Court to grant the Petition so that these conflicts may be remedied and the law in this area clarified. Accordingly, Dobson joins petitioner in respectfully requesting that this Court provide clarification regarding the standards used to determine which actions are subject to the statutory prohibition under section 332(c)(7)(B)(i)(II).

SUMMARY OF ARGUMENT

This case involves the interpretation of a provision of the Telecommunications Act of 1996 that is of great import to the wireless communications industry and its subscribers. The particular provision at issue clearly states what Congress sought to accomplish: state and local governments that regulate wireless facilities such as towers and antennas may not "prohibit or have the effect of prohibiting the provision of personal wireless services." 47 U.S.C. § 332(c)(7)(B)(i).

Surprisingly, the Courts of Appeal have reached wildly divergent conclusions on what Congress meant when it restricted local governments ability to "prohibit or have the effect of prohibiting the provision of personal wireless services." Some of the interpretations by the Courts of Appeal in fact give local governments broad rein to take actions that prohibit wireless providers from providing personal wireless services, either directly or indirectly, contrary to the express will of Congress as expressed in the statute.

The Third Circuit decision below is such a case. The Court below has held that a local government has the authority to deny a wireless provider the ability to construct facilities that it needs to provide service to fill a gap in its coverage, and that such a denial does not prohibit, or have the effect of prohibiting, the provision of personal wireless service *as long as some other wireless provider has coverage in the affected area.* The results of this decision are that a provider may be prohibited from ensuring that its subscribers receive service and that subscribers may be denied the ability to use their phones in the affected area, because the mere existence of some form of wireless telephone service in that area does not ensure that the subscribers will be able to access the personal wireless services to which they subscribe.

Three other Courts of Appeals have addressed the "prohibit, or have the effect of prohibiting" clause, and each has reached different conclusions from the other courts. The Fourth Circuit has held that the "prohibit, or have the effect of prohibiting" restriction applies almost exclusively to the establishment of formal policies banning the construction of wireless facilities. Only the repeated denial of *seriatim* siting requests by a provider would suffice to show the "effect of prohibiting," in the Fourth Circuit's view.

The First Circuit has acknowledged that an individual denial of a wireless provider's siting request may constitute a prohibition, or have the effect of a prohibition, but it has placed a substantial burden on the provider to demonstrate that this is the case, effectively forcing the provider to show that the local government is so hostile to siting requests that it would be futile to pursue alternatives. The Second Circuit, on the other hand, has limited the applicability of the restriction on local site regulation by holding that regulators may deny a provider's request and instead mandate the "least intrusive" way of serving a particular area.

The Court of Appeals decisions collectively impose substantial obstacles to wireless providers' deployment of facilities that Congress clearly sought to facilitate. Thus, the will of Congress has been undone. The issue of local governmental restrictions on wireless facility siting is crucial to the seamless growth of competitive wireless services and to provision of reliable service to the public. This issue was sufficiently important that Congress enacted Section 332(c)(7)(B)(i)(II). Due to the divergence among the Courts of Appeals in the application of this provision, and the promulgation of several interpretations that undermine Congress's intention to resolve the issue in favor of the widespread availability of wireless service, an important issue of federal law exists that requires resolution by this Court.

REASONS FOR GRANTING THE PETITION

The case before the Court involves the interpretation of a provision of the Telecommunications Act of 1996 that is of great import to the wireless communications industry and its subscribers. This case presents the straightforward issue of what Congress sought to accomplish by plain and clear language. The statutory provision at issue stated Congress's intention to place limits on local governments' authority to regulate the "placement, construction, and modification" of facilities such as towers and antennas used for the provision of personal wireless services. In particular, the statute provides that in regulating such facilities, governments —

> (I) shall not unreasonably discriminate among providers of functionally equivalent services; and
>
> (II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.

47 U.S.C. § 332(c)(7)(B)(i). The Courts of Appeals have reached widely divergent conclusions as to what limits, if any, the "prohibit or have the effect of prohibiting" language in Section 332(c)(7)(B)(i)(II) places on local regulators. The conflict among the circuits causes uncertainty in the industry and impedes the seamless provision of service. Moreover, the interpretations of all the Courts of Appeals give undue freedom to state and local regulators to impede wireless facility deployment, which undermines what Congress sought to accomplish: namely, the seamless build-out of multiple competing wireless service providers.

I. THE COURT OF APPEALS' DECISION CONFLICTS WITH OTHER CIRCUITS, REQUIRING CLARIFICATION BY THIS COURT TO AVOID INCONSISTENT RESULTS AND DAMAGING EFFECTS

The Court of Appeals decision applied a two-pronged test to determine whether a local action violated the prohibition set forth in Section 332(c)(7)(B)(i)(II). The first prong of this test was to determine whether local zoning policies and ordinances "result in 'significant gaps' in the availability of wireless services." *Omnipoint Communications Enterprises, L.P. v. Newtown Township*, 219 F.3d 240, 241 (3d Cir. 2000). In order to ascertain the adequacy of a provider's showing that a significant gap exists, the Court followed the standard it had recently established in *APT Pittsburgh Limited Partnership v. Penn Township*, 196 F.3d 469 (3d Cir. 1999), which requires carriers to supply "evidence that the area the new facility will serve is not already served by another provider." *APT*, 196 F.3d at 480. This second prong that the Court of Appeals added significantly cuts back the limitation on local government authority prescribed by Congress. As applied by the Third Circuit, the statute prevents local authorities from regulating only where the regulation prohibits all service by

all providers; if there is *any* service from *any* provider, the Court of Appeals considers that there is no prohibition. Petitioner refers to this standard as the "all carriers" requirement.

The "all carriers" requirement is nowhere contained in the statute, and indeed it is directly contrary to the objectives Congress sought to achieve, as discussed below. Moreover, none of the other Courts of Appeals that have considered the interpretation of this statutory provision have reached the same conclusion as the Third Circuit. Indeed, the other Courts of Appeals have adopted a surprisingly wide variety of readings of this statutory provision, leading to a clear split among the circuits. As detailed in the Petition, the United States Courts of Appeals for the First, Second and Fourth Circuits have adopted different and inconsistent approaches to determining whether denials of applications by local governments have the effect of prohibiting the provision of personal wireless services and therefore are subject to the ban in Section 332(c)(7)(B)(i)(II). Below, Dobson discusses how the unsettled state of the law is a matter of great importance not only for wireless providers, but also for the members of the public who rely on personal wireless services and expect their service to be available without significant coverage gaps, whether or not another provider has coverage.

A. The Fourth Circuit Would Allow Local Governments to Prohibit the Provision of Wireless Services through Case-Based Denials

The Fourth Circuit's interpretation of the statutory provision at issue is far more limiting than even the Third Circuit's "all carriers" requirement. In *AT&T Wireless PCS, Inc. v. City Council of Virginia Beach*, 155 F.3d 423 (4th Cir. 1998), the Fourth Circuit found that the provision only applies to "blanket prohibitions" and "general bans or

policies." Even though the court suggested that the policies in question need not be explicit, it was unwilling to adopt a broader application that would include individual case-based denials.

The *Virginia Beach* decision ignores the practical reality that the denial of a single application may prevent a wireless carrier from providing services in a given area. Different carrier networks are based on a variety of designs and a broad range of differing technologies.[2] As such, the impact of the denial of an application may vary widely from carrier to carrier. It is possible that the denial of a single application for a carrier may present that carrier with no alternative but to leave a large gap in coverage in a particular geographic area, while the denial of a similar application for a second carrier might not produce such a result. Thus, a general policy need not be implemented for a local government to effectively prohibit the provision of the personal wireless services for which the denied provider sought authority.

The Fourth Circuit's interpretation is not shared by other Courts of Appeals. Indeed, the First Circuit has specifically rejected the notion that only a general policy, such as a ban on towers, would constitute a prohibition. The First Circuit recognized that in some instances a carrier's proposal may be "the only feasible plan" and as such, "prohibiting its plan might amount to prohibiting personal wireless service." *Town of Amherst, N.H. v. Omnipoint Communications Enterprises, Inc.*, 173 F.3d 9, 14 (1st Cir. 1999).

---

[2] Wireless carriers utilize a variety of frequency bands and several analog and several different digital transmission technologies. A subscriber's phone will work with the particular combinations it was designed for. Some phones will only work in a single frequency band and a single technology. For example, a 900 MHz analog cellular phone cannot operate with an 1800 MHz digital system.

Further, the Fourth Circuit's unwillingness to consider case-based denials contradicts the statutory scheme of section 332(c)(7)(B). *Virginia Beach* requires that carriers provide evidence of a general ban or policy against the installation of wireless facilities. If no explicit policy exists, then the carrier would be forced to wait until it had suffered a series of denials, to be able to make a sufficient showing that an implicit ban was in place. As noted by the Second and Third Circuits, such a lengthy process appears to contradict the scheme that Congress put in place in 47 U.S.C. § 332(c)(7)(B)(v), which established a process for expedited appeals such that conflicts over the legality of local regulation could be resolved quickly.

The Fourth Circuit standard may also allow local authorities to circumvent the section 332(c)(7)(B)(i)(II) prohibition by simply never adopting a formal policy banning wireless facilities. Indeed, the Fourth Circuit's approach effectively embraces a variant on the Third Circuit's "all carriers" requirement, in that the existence of a single wireless carrier's coverage could be used as evidence that there is no prohibition policy, formal or informal. The Second Circuit criticizes the Fourth Circuit's conclusion on this very ground. The Second Circuit opines that this standard "would lead to the untenable result that once personal wireless services are available somewhere within the jurisdiction of a state or local government ... the state or local government could deny any further applications with impunity." *Sprint Spectrum L.P. v. Willoth*, 176 F.3d 630, 641 (2d Cir. 1999).

In *360 Degrees Communications Co. of Charlottesville v. Board of Supervisor of Albemarle County*, 211 F.3d 79 (4th Cir. 2000), the Fourth Circuit reaffirmed its holding that local policies and general bans were statutorily prohibited. Addi-

tionally, the Court there stated that case-based denials would be considered evidence of a prohibition only where there are "indications by a local government that repeated individual application will be denied because of a generalized hostility to wireless services could also violate [the statute]." 211 F.3d at 86. Despite this broader approach, the Fourth Circuit decision would likely still force carriers to wait until after they have suffered a series of denials or gathered other evidence of a generalized hostility, in order to make a sufficient showing of an implicit ban by the State or local government. Such a standard is contrary to the statutory scheme in section 332(c)(7)(B)(v).

B. The First Circuit's "Hostility" Requirement Contradicts the Statutory Scheme

The First Circuit addressed the Section 332(c)(7)(B)(i)(II) prohibition in *Town of Amherst*. There, the Court of Appeals properly recognized that certain individual decisions could amount to an effective prohibition on personal wireless service. The Court immediately diminished the effect of this determination, however, when it held that the carrier bore a heavy burden to show that "further reasonable efforts are so likely to be fruitless that it is a waste of time to even try," for example by showing that the government agency has a "fixed hostility" to granting the needed clearance. *Town of Amherst*, 173 F.3d at 14. The effect of this "hostility" requirement depends on the criterion used by the courts to determine whether a generalized hostility existed. As discussed above, the appropriateness of this standard will depend on the evidence that the court requires carriers to present to make a showing of the existence of such hostility, and whether such an approach would conform to the statutory scheme set forth in Section 332(c)(7)(B)(v).

C. The Standard Adopted by the Second Circuit Fails to Take into Account Consumers' Interests

The Second Circuit's *Willoth* decision held that Section 332(c)(7)(B)(i)(II) prohibits State and local governments from denying an application for a facility that is the "least intrusive means for closing a significant gap in a remote user's ability to reach a cell site that provides access to land-lines." 176 F.3d at 643. This approach recognizes that the denial of a certain applications may result in significant gaps in reliable service coverage by a particular carrier, and as such, would violate the section 332(c)(7)(B)(i)(II) prohibition.

The Fourth Circuit has criticized the Second Circuit's approach, reasoning that by limiting the statutory prohibition to denials of the "least intrusive means" for covering a gap, the Second Circuit fails to take into account the possibility that "a community could rationally reject the least intrusive proposal in favor of a more intrusive proposal that provides better service or that better promotes the commercial goals of the community." *360 Degrees*, 211 F.3d at 87.

D. Review by This Court Is Needed

In 1999, the wireless industry experienced a 24% increase in the number of wireless subscribers, from 69.2 million to 86 million subscribers.[3] To accommodate this growth, wireless carriers such as Dobson must be able to install the necessary facilities in the markets that they serve in order to satisfactorily meet consumers' demand for wireless services. Consumers expect to be able to use their wireless devices reliably virtually everywhere, particularly in their home markets. The

---

[3] *See* Federal Communications Commission, *Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Services*, FCC 00-289, 2000 FCC LEXIS 4372 at *9 (2000) (*CMRS Competition Report*).

public has become increasingly reliant on wireless service for security and safety, including for emergency communications. Accordingly, wireless providers need to fill gaps in coverage where subscribers are likely to use their wireless devices.

To fill these gaps, providers must construct towers, antennas, and other facilities, many of which require local governmental clearances. A vast number of actions must be taken by local authorities regarding the placement, construction and modification of wireless facilities. As a result, there are many denials of authority, which in turn results in many lawsuits seeking review of the state or local governments' actions under Section 332(c)(7)(B)(i)(II). To date, suits have been addressed by four Courts of Appeals, which have followed divergent views of the limits that Section places on state and local authorities' authorization to act adversely to wireless providers. In light of the lack of any common decisional principles, it is not reasonable to expect that the split among the circuits can be resolved any time soon. Indeed, as more circuits consider the statute, one can expect even more diverse interpretations, if the past is any indicator — unless this Court intervenes to provide guidance.

This statute has immediate effects on wireless providers and their customers. Waiting for many years to pass while the circuits thresh out the optimum interpretation is not in the public interest. Wireless providers must invest large amounts of money in facilities in order to provide reliable, ubiquitous service in response to the demands of their subscribers. Uncertainty will discourage this investment and will deprive the public of the personal wireless services that Congress wanted to facilitate. Clarification of the applicable standard for analyzing this statutory prohibition by this Court would assist the lower courts by providing them with the necessary guidance in this area.

II. THE COURT OF APPEALS DECISION VIOLATES THE TELECOMMUNICATIONS ACT OF 1996

A. The Court of Appeals Decision Contradicts the Prohibition in Section 332(c)(7)(B)(i)(II)

As discussed above, the court of appeals decision held that in denying an carrier's application, the government did not violate Section 332(c)(7)(B)(i)(II), unless carriers are able to show that the area where the carrier proposed to install its facilities and provide service was "not already served by another provider." *Omnipoint Communications Enterprises*, 196 F.3d at 480. In other words, the Court of Appeals views only a ban on service by *all carriers* to be a prohibition subject to the provision.

Dobson respectfully submits that the "all carriers" requirement is an inappropriate standard for determining whether there is a significant gap in the availability of wireless services, and it undermines and contradicts the express intent of Congress.

This standard fails to take into account whether consumers will experience a significant gap in coverage for the services to which they have subscribed. The fact that a particular geographic area is served by one wireless carrier does not mean that customers will be able to access this service. Different wireless carriers in the same geographic market are licensed to operate in different frequency ranges. For example, cellular systems operate in the 800 MHz range whereas Personal Communication Services ("PCS") systems operate in the 1900 MHz range. Thus, in a locality where only cellular service is available, a PCS subscriber will not be able to the wireless service unless the subscriber is using a dual band phone.

The effect of this ruling will be to diminish the availability of service to subscribers, because the service that may exist in a given area may not be readily usable, or even usable at all, by subscribers to a given provider's service. If the existing service uses a frequency band or technical standard that is not supported by the subscriber's phone, the subscriber's phone will simply display the "NO SERVICE" indicator. If the existing service is technically compatible with the subscriber's phone, the subscriber may be able to place calls at a much higher charge than on their own provider's system. However, the subscriber may be unable to receive calls; when a call is placed to a subscriber located in a part of the subscriber's service area that has a coverage gap, the calling party will typically get a recorded message stating that the called phone is unavailable, unless special arrangements have been made between the providers for automatic home market roaming.

Likewise, the different technologies and standards used by different carriers' networks may also prevent customers from accessing wireless services to which they are not subscribed. For example, Dobson currently operates a cellular network that primarily uses TDMA (Time Division Multiple Access) technology.[4] If a Dobson customer attempted to access wireless service in an area served by a carrier using CDMA (Code Division Multiple Access) technology,[5] the Dobson customer would not be able to access this service unless the customer is using a dual mode phone equipped to access both TDMA and CDMA networks. Subsequently, if the Dobson customer were to drive to an adjacent market, where the local govern-

---

[4] TDMA is a digital technology that allows multiple users to share the same voice channel by having each conversation transmitted alternately over short lengths of time.

[5] CDMA is a digital technology that separates communications by code, allowing a system to mix a number of calls into the same channel.

ment has allowed only one carrier to install the necessary facilities to provide coverage, and if that carrier used GSM[6] technologies, then this customer will be impeded from accessing wireless services in this adjacent area altogether.

Given the diversity of the technologies used by wireless carriers, the standard adopted by the court of appeals would promote an infrastructure in which all carrier networks would have gaps in coverage in different geographic locations. Such a scenario would leave the consumer with no practical way of accessing wireless services while moving from one geographic area to another. Thus, the carrier serving this customer has been denied the ability to provide personal wireless services to its customer.

B. The Court of Appeals' Decision Undermines the Objectives of Promoting Competition and Innovation

Congress enacted the Telecommunications Act of 1996 "to promote competition and reduce regulation in order to secure lower prices and higher quality of services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." Pub. L. No. 104-104, 110 Stat. 56, 56 (1996). Dobson agrees with petitioner's argument that the effect of the Court of Appeals decision is anti-competitive. Moreover, Dobson submits that the decision obstructs not only Congress' general goal in the Telecommunications Act of encouraging the rapid deployment of new telecommunications technologies, but also undermines the clear intention, as expressed in the words of Section 332(c)(7)(B)(i)(II), that state and local authorities

---

[6] Global System Mobile ("GSM") is a particular implementation of TDMA used widely throughout the world for wireless service; it is not interoperable with the other forms of digital technology that are common in the United States.

not be permitted to take any action that *has the effect of prohibiting* any form of wireless service.

As argued by petitioner, the court of appeals' decision favors wireless coverage by incumbent carriers. Meanwhile, newer carriers that are licensed to provide coverage in the same geographic area, and that bring with them new technologies for such enhancements as improved reception or advanced services, would be stripped of their rights to challenge local decisions that prohibit them from providing service in this area. Consequently, the new carrier may have significant gaps in coverage that it will not be able to fill. With significant gaps in coverage, this newer carrier would be less likely to succeed, or for that matter, to promote the use of the new technologies that it plans to offer. At the same time, the incumbent carrier, without a viable competitor, would have little incentive to upgrade its own technology or service offerings.

Congress was well aware of the fact that much of the United States already received wireless service in 1996 when the statutory provision was enacted; new licenses had recently been auctioned, however, and Congress was attentive to the new competitors' need for siting of facilities. Surely Congress did not intend by this provision to give local authorities *carte blanche* to block new entry. To the contrary, the only reason why this provision was needed at the time it became law was to facilitate the entry of new competitors. Reading the provision so that the mere presence of an incumbent's radio signal acts gives local regulators a justification for barring new competitors is simply inconsistent with the pro-competitive purposes of the Telecommunications Act.

The international community has been actively seeking to promote the migration of wireless services to third generation ("3G") wireless systems. 3G technology promises such capabilities as high speed Internet access, video and audio stream-

ing and location-based services such as services that would alert travelers of an event in a city they are visiting.[7] If the standard adopted by the Court of Appeals were allowed to stand, it would stymie the efforts by licensees seeking to install new facilities to accommodate 3G and other new technologies. Such an outcome will obstruct rather than promote the primary objective of the Telecommunications Act, as consumers might be unwilling to invest in subscriptions to newer service if the breadth of coverage by the newer carrier is less comprehensive than that of an incumbent.

CONCLUSION

For the foregoing reasons, Dobson respectfully requests that the Court grant the petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit filed by Omnipoint.

Respectfully submitted,

MICHAEL DEUEL SULLIVAN

CHRISTIANA L. LIN

WILKINSON BARKER KNAUER, LLP
2300 N Street, N.W., Suite 700
Washington, D.C. 20037-1128
202.783.4141

Counsel for Dobson Cellular, Inc.

October 5, 2000

---

[7] *See* CMRS *Competition Report* at *36-*37.